Mulewa v Republic (Criminal Appeal 61 of 2020)
[2023] KECA 263 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 263 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 61 OF 2020

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

MARCH 17, 2023

BETWEEN

JAMES MULU MULEWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya (Korir, J.) dated on 29th November, 2013) in Nairobi HCCRA No. 16 of 2012)

JUDGMENT

1. This is an appeal from the judgment of Korir, J delivered on November 29, 2013 in which the trial court convicted the appellant for the offence of murder and sentenced him to 35 years' imprisonment.

2. The particulars of the offence were that on February 27, 2012 at Mathare North in Nairobi County, the appellant murdered Mercy Muthethya Ngali contrary to section 203 as read with section 204 of the *Penal Code*. Mercy Muthethya Ngali, "the deceased", met her death in her mother's house in the hands of a knife wielding man who stabbed her 16 times in her lower abdomen, thighs, private parts, bladder, uterus and liver which were all ruptured as a result. The attacker who was said to be the appellant and her boyfriend of two years was arrested at the scene of crime.

3. The prosecution called a total of nine (9) witnesses to prove its case against the appellant. Ruth Mawe (PW1), a resident of Mathare North , was in her house when she was informed by one, Mama Dani that the appellant was assaulting the deceased in her mother's house. She mobilized her neighbours to intervene. Beatrice Ngare Mutua (PW2), the deceased's mother was told by PW1 that there were screams emanating from her house. When she went to check, she found the door locked from inside. On peeping through the key hole, she saw the appellant assaulting the deceased. The deceased's sister Winfred Mukasi Ngali (PW3), was informed by Magdalene Nduku that there was commotion in their house. She informed police officers who were on patrol. Four police officers went with her to the

house and when the appellant was ordered to open the door, he refused claiming that he had killed the deceased.

4. Among the police officers was PC, Charles Omondi Were (PW4), who stated that he received a distress call from PW3 and went to the scene. The appellant, initially refused to open the door when ordered, but eventually, did so after persuasion by the police officers. The deceased was found lying on the bed. There was a lot of blood on her body as well as on the floor of the house. PC Kamaru Njoroge (PW5) of Muthaiga Police Station confirmed that he, together with PC Gitonga, PC Kirui and PW4 were on patrol duties when they received a call from PW3 who informed them that a man was assaulting her sister in her mother's house. She led them to the house whereupon they ordered the appellant to open the door but he resisted claiming that he could only do so once PW5 dispersed the crowd that had gathered. When the appellant eventually opened the door, he handcuffed him, handed him to PC Kirui and PW4 to take him to the police station while PC Gitonga and himself remained at the scene. He noticed that the deceased had wounds on her lower abdomen and was bleeding profusely. They rushed her to hospital but was pronounced dead upon arrival. Dr. Peter Muriuki Ndegwa (PW6) conducted the postmortem on the body of the deceased at the City Mortuary. The body was identified by Joshua Murpwoki Ngali, a brother to the deceased and PW3 with PC Mwanzia in attendance.

5. From the postmortem conducted, PW6 noted 3 wounds on the occipital skull, 6 penetrating stab wounds on the lower abdominal wall, 3 penetrating stab wounds in the pubic area, 1 penetrating stab wound each on the thigh, right rib cage, left lip of the vagina, and on the right buttock. In total, there were 16 stab wounds and 3 cut wounds. Internally, he found the vaginal wall lacerated, the bladder, uterus and liver ruptured. He formed the opinion that the cause of death was exsanguination due to multiple stab wounds. PW7 Henry Kiptoo Sang a government analyst based at government laboratory in Nairobi was called as the 7th witness. It was his testimony that on March 9, 2012 he had received a knife, three separate blood samples from both the appellant and the deceased, high vaginal swab and saliva sample from the appellant for purposes of examination and determination of DNA profile. That he tried to generate a DNA but was not able to probably because the blood had degenerated. No seminal stains were detected on the vaginal swab though according to him, but this did not rule out sexual intercourse as the same was due to poor blood preservation.

6. PW8 was PC Stephen Mwaniki the investigating officer. That in the course of his investigation, he learnt that a kitchen knife had been recovered inside the house where the incident had taken place. That, he recorded statements from various witnesses who were the deceased mother, sister, cousin and two police officers. That the deceased had been seen on the February 27, 2012 walking together with the deceased towards the house where the incident happened and some screams were heard from the house. The witnesses who went to the house saw the appellant inside the house which had been locked from inside and the officers who arrested the appellant, found the appellant and the deceased who was still alive with several stab wounds hence arrested him.

7. PC Suleimn Kadilo Ganze who took over the investigations from PW8, produced the P3 form. PW9, Dr Maundu Joseph a police surgeon testified to the fact that the appellant had undergone mental assessment and examination by Dr Kamau which revealed that he had superficial wounds on the palm of the right thumb and the said injuries were 9 days old and had been inflicted by a sharp object. That the appellant was approximately twenty years and mentally fit to stand trial.

8. Put on his defence, the appellant stated in his unsworn statement that the deceased was his girlfriend and that on the material day she invited him to her mother's house. Upon arrival, and after talking for about 15 minutes, the deceased accused him of having another girlfriend and a fight ensued between them. The deceased hit him with several kitchen items and finally picked a knife to stab him but in the process, she was stabbed. The appellant further stated that it was the deceased who had locked

the door and that she wanted them to have sex in her mother's house, a request he turned down as he considered it an abomination. He admitted that there was a knife in the room but disputed the pathologist's testimony that the deceased had 16 penetrative stab wounds.

9. As already pointed out, after hearing the case, Korir, J convicted and sentenced the appellant to 35 years' imprisonment, thus provoking this appeal. In his memorandum of appeal, the appellant faults the trial court for failing to find that: the essential ingredients of the offence were not proved; essential witnesses were not called; the P3 form showed that the appellant suffered injuries as well which proved that there was a scuffle between the two of them; the prosecution case was riddled with material contradictions and inconsistencies; in meting out a sentence that was both harsh and excessive in the circumstances; and rejecting the cogent defence which exonerated the appellant from commission of the alleged offence.

10. Presenting the appellant's appeal, Mr Mutiso, learned counsel opted to rely entirely on his written submissions without highlighting. He submitted that the trial court erred in not finding that the offence of murder was not proved beyond reasonable doubt. He submitted that the prosecution failed to establish the essential ingredients of murder; that is, that the appellant caused the death of the deceased, he did so by an unlawful act or omission and finally, death of the deceased was as a result of malice aforethought. However, in the circumstances of this case, none of the above elements were proved.

11. Relying on the case of *Nzuki v Republic* [1993] eKLR, the appellant submitted that the mere fact that the accused's conduct is undertaken in the knowledge that grievous harm is likely to ensue, is not by itself sufficient to convert the action into an offence of murder.

12. He further submitted that the prosecution failed to prove that the appellant carried the murder weapon into the house. That it was common ground that the appellant and the deceased were lovers and a quarrel erupted while they were in the house. No witness testified about the nature of the quarrel apart from the appellant who testified that the deceased provoked him by accusing him of having an affair with another girlfriend. The appellant further submitted that the deceased hit him with several kitchen items and picked a knife with intention to stab him. He grabbed the knife and in the process, the deceased was stabbed. The P3 form confirmed that the appellant suffered cut wounds and laceration on his hand, which was indicative of a struggle to defend himself from the attack. He continued to state that given the foregoing, there could not have been malice aforethought on his part but that he merely acted in self defence after being provoked by the deceased.

13. On whether the trial court erred in rejecting the appellant's defence of provocation and self-defence, it was submitted that the appellant testified that the deceased confronted him, accusing him of having an affair with another woman. After which, a struggle ensued. As the fight escalated and the deceased reached out for a knife, the appellant was provoked and acted out of rage and or in the heat of passion before he could have time to cool off. That the deceased's accusations against the appellant, coupled with the fact that she grabbed a knife with intent to stab the appellant, temporarily deprived the appellant of the power of self-control consequent to which, he retaliated in the heat of the moment. The prosecution did not disapprove these facts pertinent to the defence of provocation and self-defence

14. On whether the sentence meted out was harsh and excessive in the circumstances, counsel submitted that the trial court erred in law by failing to consider the appellant's mitigation, thereby arriving at an excessive and harsh sentence given that the appellant was a first offender and was remorseful. He stated that the appellant had undertaken transformational courses and obtained Certificates in Theology whilst in prison and was no longer a threat to the society at large. Prior to the conviction and sentencing,

he had been in custody for 6 years which should be taken into account should this court be inclined to interfere with the sentence.

15. In reply, Ms. Ngalyuka, learned prosecution counsel too relied on her written submissions and did not wish to highlight as well. On whether the offence of murder was proved beyond reasonable doubt, counsel submitted that there was sufficient evidence tendered to prove the offence against the appellant and that each and every ingredient for the offence was proved. She continued to submit that the fact and the cause of death of the deceased was a direct consequence of an unlawful act or omission on the part of the appellant; and that the said unlawful act or omission was committed with malice afterthought which were all proved to the required standard. She submitted that the police officers who responded to the distress call testified that they found the appellant inside the house which was locked from inside with the deceased lying on a bed bleeding and gasping for breath. Upon being rushed to the hospital, she was pronounced dead on arrival. A post mortem on the body of the deceased revealed 16 penetrating wounds with the cause of death being exsanguination due to multiple stab wounds. This evidence was sufficient to prove the death of the deceased and the cause thereof.

16. On proof that death was as a result of the direct consequence of an unlawful act or omission of the appellant, she submitted that only the appellant had the opportunity to commit the offence. The appellant was arrested at the scene of crime by police officers who responded to the distress call. It was in evidence from the testimony of the officers that upon arrival the door to the house was locked from the inside with both the appellant and the deceased inside the house. When the appellant opened the door, they found the deceased with stab wounds and was bleeding. A knife used to stab the deceased was also recovered in the house. It could only have been the appellant, therefore, who could have caused those fatal injuries.

17. On malice afterthought, she submitted that it was proved in terms of section 206 of the *Penal Code*. She further submitted that the facts as tendered in evidence, prove that the appellant had the intention to cause the death or to do grievous harm to the deceased when he armed himself with a knife before coming to the house where the deceased was. The nature of injuries sustained by the deceased were prove enough that the appellant committed the offence with malice aforethought. That the act of repeatedly stabbing the deceased connotes malice aforethought as held in the case of *David Mwangi Monica v Republic* [2020] eKLR while quoting *Morris Alouch v Republic*, Cr Appeals No 47 of 1996 (UR), where the court stated that where there was evidence of repeated blows that inflicted the injuries, then malice aforethought could well be presumed in such a scenario. According to PW 6 the deceased sustained a total of 16 stab wounds.

18. On the appellant's defence of provocation and self-defence, it was submitted that the trial court weighed both defences as against the evidence adduced by the witnesses in order to determine whether the same were available to the appellant but was persuaded that they were not. She supported the finding by the trial court that the facts as given by the appellant did not support the defence of provocation and or self-defence. Those defences could not suffice since it was in evidence that it was the deceased who was being assaulted by the appellant and not vice versa.

19. On sentence, it was submitted that in light of the circumstances and manner in which the offence was committed, the sentence of 35 years' imprisonment imposed was merited and well deserved. It was thus neither harsh nor excessive. She therefore urged us not to interfere with the same.

20. We have duly considered the record of appeal, submissions by the respective learned counsel, the authorities cited and the law. The jurisdiction of this court in a first appeal was succinctly enunciated in the case of *Okeno v Republic* [1972] EA 32 thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M Ruwala v R, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peter's v Sunday Post, [1958] EA 424."

21. We are nonetheless free to draw our own conclusions on the evidence without overlooking those of the trial court which had the advantage of seeing and observing the demeanour of the witnesses as they testified. In this regard, it is discernible that the appeal is predicated on three main grounds, whether: the trial court erred by failing to find that the offence of murder was not proved beyond reasonable doubt; the defence of provocation and self-defence was available to the appellant; and, whether the sentence meted out on the appellant was harsh and excessive in the circumstances.

22. On the first ground, we reiterate that for the charge of murder to be sustained, it is upon the prosecution to demonstrate the death of the deceased and the cause of that death; that the appellant committed the unlawful act which resulted in the death of the deceased; and, that the appellant had malice aforethought in doing so.

23. From the post-mortem report dated February 29, 2012 and the testimony of PW6, the death of the deceased and its cause was proved. The cause of death was exsanguination due to multiple stab wounds. From the record, this evidence was in tandem with the evidence of PW2 to PW5, who all responded to the distress call and found the deceased on bed with the visible multiple stab wounds and bleeding from various parts of the body. The deceased was then rushed to the hospital but was pronounced dead upon arrival at the facility. We have no doubt that with this glaring evidence, we cannot substitute the finding of the trial court on the death of the deceased and its cause with that of any other hypothesis.

24. As to who caused the death, the evidence on record from both the prosecution and the appellant himself is that the deceased and the appellant were found locked in the PW2's house. The appellant was known to most of the witnesses that testified. PW1 lived in the same plot with the deceased and was concerned with the commotion in PW2's house. She consequently alerted PW 2 and PW 3 who in turn called in the police officers. Together they went to the house and found the door locked from inside. When the police ordered the appellant to open the house, he refused saying that he would not open the house as he had killed the deceased and or that he would only do so once PW5 had dispersed the crowd that had gathered and was baying for his blood. When he eventually opened the door, they found that the deceased was not talking at the time, and had multiple stab wounds and her body soaked in blood. Further, a blood-stained knife was recovered from the bucket in the house.

25. The trial court believed the testimony of PW2, PW3, PW4 and PW5 who the court found were not only candid, but also had no reason to falsely testify against the appellant or frame the appellant with regard to the above account and indeed, the entire case. In any event, the appellant conceded that he fought with the deceased and when she went for the knife and he tried to retrieve it from her, the

deceased was stabbed. So his evidence places him at the scene of crime, in which event, the identification of the appellant in the crime is a non-issue. The question then shall be whether his narrative of the events is plausible. We have doubts regarding that narrative. Nonetheless, in our view, the appellant as it were, was caught red- handed in the act. Commenting on this aspect, the trial court observed thus:

> " The fact that the accused was arrested at the scene leaves no room for any doubt that he was the one who stabbed the deceased. There was no one else in the house other than himself and the deceased. Since the deceased could not have stabbed herself 16 times, the only logical conclusion is that the accused is the one who stabbed her. I am satisfied that he was properly identified by the witnesses who knew him prior to the date of the incident."

26. We entirely agree with the above summation and that the appellant's own unsworn statement of defence also placed, him at the scene of crime. It is not in dispute that indeed the injuries were caused by him given the fact that the same were caused by a knife and the knife was recovered from the house. Indeed, the appellant admits to grabbing the knife from the deceased even before she could use it against him. We are unable to fathom how the deceased who had grabbed a knife with the sole intent to stab the appellant would certainly have a change of mind and turn it against herself 16 times as the appellant wanted the trial court to believe. We are thus convinced just like the trial court that the death of the deceased was caused by none other than the appellant, as the two were the only ones in that house.

27. On malice aforethought, the trial court rightly took note that the ingredients were well set out in section 206 of the *Penal Code* thus:

> " Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
>
> a. an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
>
> b. knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is cause or not, or by a wish that it may not be caused;
>
> c. an intent to commit a felony;
>
> d. an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."
>
> Whilst citing the case of *Bonaya Tutu Ipu & another v Republic* [2015] eKLR, this court in the case of *Milton Kabulit & 4 others v Republic* [2015] eKLR stated that:
>
> > " .... "malice aforethought" is the mens rea for the offence of murder and it is the presence or absence of malice aforethought which is decisive in determining whether an unlawful killing amounts to murder or manslaughter. Whether or not malice aforethought is proved in any prosecution for murder depends on peculiar facts of each case. (See Moris Aluoch v Republic Cr Appeal No 47 of 1996) where the court went further and drew inspiration from a

persuasive authority in the case of Chesakit v Uganda Cr Appeal No 95 of 2004 wherein the Court of Appeal of Uganda held thus:

> "In determining a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person.""

28. The trial court correctly considered the evidence of the prosecution witnesses especially PW1 to PW5 in determining whether the appellant had developed the intention to kill the deceased. There is evidence that the appellant armed himself with a knife before proceeding to meet the deceased. That act in itself clearly demonstrates that the appellant intended to use the knife either to kill, cause grievous harm or commit a felony on the deceased. Indeed, he used it to stab the deceased repeatedly 16 times ultimately leading to her death. We revert to the case of *Bonaya Tutu Ipu & another v Republic* [supra], in which it was held that malice aforethought may be inferred from the type of weapon used, the injuries occasioned and the part of the body that the injuries were targeted. The deceased sustained 16 stab wounds at the hands of the appellant. Further, the stab wounds were directed at the most vulnerable parts of the deceased's body like the head, the abdomen, vagina, buttocks and rib cage. We need not belabor the point as we are fortified in our reasoning by the decision of this court in *James Masomo Mbacha v Republic* [2015] eKLR where the Court of Appeal pitched that:

> "malice aforethought was manifested by virtue of the multiple injuries aimed at the most vulnerable parts of the body by use of a lethal weapon."

Though the appellant disputed the number of stab wounds found on the deceased, the evidence on record confirms the figure of 16 as against the appellant's claim that there was only 1 stab wound. The appellant did not attend the post-mortem nor is he a pathologist. Here the word of PW6 counts.

29. The appellant raised the defences of provocation and self-defence. In our evaluation of the evidence adduced, we cannot but conclude as did the trial court, that these defences were unavailable to the appellant given the cogent and compelling evidence of the prosecution witnesses. In the case of *Victor Nthiga Kiruthu & another v Republic* [2017] eKLR this Court stated thus on the defence of self defence:

> "The principles that have emerged from these and other authorities are as follows:
>
> i. Self defence, as the term suggests, is defence of self. It is the use of force or threat to use force to defend one self, one's family or ones property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.
>
> ii. The law generally abhors the use of force or violence, but there are instances when a person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it, meaning that the force must be necessary and that it must be reasonable.

iii. It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it.

iv. The danger the accused apprehends however must be sufficiently specific or imminent to justify the action he takes and must be of a nature which could not reasonably be met by mere pacific means.

v. What amounts to reasonable force is a matter of fact to be determined from evidence and the circumstances of each case."

30. The trial court properly considered the law and evidence and rightly rejected the appellant's pleas of provocation and self-defence. Those defences were not clearly available to the appellant, as he intentionally and deliberately armed himself with a knife for ulterior motives and without provocation. He was never under any imminent threat of attack. In any event, stabbing someone sixteen (16) times cannot be said to have been reasonable force to ward off the attack by the deceased, if at all. We also doubt whether being accused of having another girlfriend would cause someone to lose their sense of self- control and act in the heat of the moment as claimed by the appellant. In such a case, who would be most provoked? Further, the appellant on one hand claims that he was provoked when he was accused by the deceased of having an affair with another woman and on the other hand claims that he was provoked when the deceased insisted on having sex with her in her mother's house. So which is which? Accordingly, we are satisfied that the appellant's conviction by the trial court for the offence of murder was justified and within the confines of the law.

31. With regard to the sentence meted out on the appellant, and considering the macabre, gruesome and premeditated manner in which the offence was committed, the 35 years' imprisonment meted out on the appellant was well deserved. We therefore see no reason to interfere with the same.

32. The upshot of the foregoing is that, we find no merit in the appeal, which is accordingly dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR